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Shahrizal bin Abdul Ghani v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–38 OF 2011
ABU SAMAH (NOW FCJ), AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA
7 OCTOBER 2013

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Criminal Law — Dangerous Drugs — Trafficking in dangerous drugs — Appeal against conviction and sentence — Whether accused's defence created reasonable doubt — Whether accused carried out negotiation — Dangerous Drugs Act 1952 s 39B(1)

D

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused convicted for offence of drug trafficking and sentenced to death — Whether chemist report correctly admitted — Whether there were serious doubts to identity of drugs exhibit — Whether trial judge erred in handling facts — Whether informers had become agent provocateurs — Dangerous Drugs Act 1952 s 39B(1)

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In the High Court, the appellant was charged for the offence of trafficking drugs under s 39B(1) of the Dangerous Drugs Act 1952 ('DDA'). PW4 was introduced to the appellant by an informer and had met the appellant at a restaurant. After a negotiation between the two, the appellant left the restaurant to get the drugs. PW4 had told the appellant to deliver the drugs to PW5 and collect the money from PW4. PW5 met up with the appellant outside the restaurant and told the appellant that he would take delivery in the car. PW5 then waited in the car and the appellant arrived later with another man ('Ahmad Tayyib'). The appellant, who carried a sling bag, unzipped the bag to reveal five slabs of compressed cannabis. The appellant then returned to the restaurant to collect the money and the ambush party sprung into action and arrested the appellant and Ahmad Tayyib. The five slabs were confirmed to be indeed 4,420g of cannabis. In the appellant's defence, it was contended that on the day of the arrest, he had accompanied Ahmad Tayyib to meet the latter's friends. The appellant then headed to the washroom and upon returning, saw Ahmad Tayyib leaving the restaurant with one of his friends and only returned 15–20 minutes later. Then, a number of persons approached their table and arrested him and Ahmad Tayyib. The appellant also denied negotiating for the sale of the drugs with PW4. At the end of the trial, the High Court found the appellant guilty, convicted him for the charge and sentenced him to death. Hence, the present appeal. The issues that arose for the court's determination were whether the chemist report was wrongly admitted; whether there were serious doubts as to the identity of the drugs exhibit; whether the trial judge

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erred in handling facts with regards to Ahmad Tayyib; and whether the informers had become agent provocateurs.

Held, dismissing the appeal:

(1) The notification of declaration which in effect was the effective recognition that science officers employed by the chemistry department was a class of persons to whom the provisions of s 399 of the Criminal Procedure Code ('CPC') should apply and whose report might be given in evidence, without the makers being required to attend as witnesses, provided that the precondition of service of a copy of the report, as laid down in the said section, had been strictly complied with (see para 28).

(2) The appellant's submission that there were serious doubts as to the identity of the drug exhibits were devoid of any merit. The prosecution had adduced sufficient evidence in respect of every link in the chain of custody, from the moment the exhibit was recovered by the police up to the time it was produced in court. The witnesses had described how and from whom it was received, where it was and what happened to it while in the witnesses' custody, the condition it was received and the condition in which it was handed over to the next link in the chain of custody (see paras 33–34 & 44).

(3) The prosecution witnesses had given affirmative answers that Ahmad Tayyib was only seen together with the appellant when the appellant returned to deliver the drugs to PW5. The prosecution witnesses had positively identified the appellant to be the man who was present in the restaurant and conducted the negotiation for sale of the drugs. The appellant brought the bag of drugs to the scene after he negotiated with PW4 and was seen clutching it and had delivered it personally to PW5. He certainly had knowledge that the bag contained drugs as he informed there were five slabs of drugs in the bag. He was certainly not a conduit pipe (see paras 48–49).

(4) The informers had not metamorphosed into agent provocateurs. The first informer's role was limited to mere introduction of PW4 to the appellant. Although he was present, there was no iota of evidence that the first informer had participated in the negotiation. His presence was merely to lend credence to PW4's intention to purchase the drugs in the minds of the appellant. The second informer's role was even smaller as he had done nothing apart from being present at the restaurant with PW5 (see para 53).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, perayu didakwa bagi kesalahan mengedar dadah di bawah s 39B(1) Akta Dadah Berbahaya 1952 ('ADB'). PW4 telah diperkenalkan kepada perayu oleh pemberi maklumat dan telah bertemu

perayu di sebuah restoran. Selepas rundingan antara mereka berdua, perayu meninggalkan restoran untuk mendapatkan dadah. PW4 telah memberitahu perayu untuk menghantar dadah kepada PW5 dan mengutip wang daripada PW4. PW5 bertemu dengan perayu di luar restoran tersebut dan memberitahu perayu bahawa dia akan mengambil penghantaran di dalam kereta. PW5 kemudian menunggu di dalam kereta itu dan perayu tiba kemudian dengan lelaki lain ('Ahmad Tayyib'). Perayu, yang membawa beg sandang, membuka beg untuk mendedahkan lima papak ganja mampat. Perayu kemudian kembali ke restoran untuk mengutip wang dan pihak serangan hendap muncul tiba-tiba mula bertindak dan menahan perayu dan Ahmad Tayyib. Lima papak kemudian disahkan sememangnya adalah 4,420g ganja. Dalam pembelaan perayu, ia dihujahkan bahawa pada hari penangkapan, dia telah menemani Ahmad Tayyib untuk bertemu rakan-rakan Ahmad Tayyib. Perayu kemudian menuju ke bilik air dan apabila kembali, menyaksikan Ahmad Tayyib meninggalkan restoran dengan salah seorang rakan-rakannya dan hanya kembali 15–20 minit kemudian. Kemudian, beberapa orang menghampiri meja mereka dan menangkapnya dan Ahmad Tayyib. Perayu juga menafikan rundingan bagi penjualan dadah dengan PW4. Pada akhir perbicaraan, Mahkamah Tinggi mendapati perayu bersalah, menyabitkannya atas tuduhan dan menjatuhkan hukuman mati. Oleh itu, rayuan ini. Isu-isu yang timbul untuk penentuan mahkamah adalah sama ada laporan ahli kimia itu salah diterima; sama ada terdapat keraguan yang serius tentang identiti ekshibit dadah; sama ada hakim perbicaraan terkhilaf dalam mengendalikan fakta berkaitan dengan Ahmad Tayyib dan sama ada pemberi maklumat menjadi ejen perangkap.

Diputuskankan, menolak rayuan:

(1) Pemberitahuan perisytiharan yang berkuat kuasa adalah pengakuan yang efektif bahawa pegawai sains yang diambil bekerja oleh jabatan kimia itu adalah golongan orang yang baginya peruntukan s 399 Kanun Tatacara Jenayah ('KTJ') terpakai dan yang laporannya mungkin diberikan sebagai keterangan, tanpa pembuat dikehendaki untuk hadir sebagai saksi, dengan syarat bahawa prasyarat penyampaian salinan laporan itu, seperti yang ditetapkan dalam seksyen tersebut, telah dipatuhi sepenuhnya (lihat perenggan 28).

(2) Penghujahan perayu bahawa terdapat keraguan yang serius tentang identiti ekshibit dadah tidak mempunyai apa-apa merit. Pihak pendakwaan telah mengemukakan keterangan yang mencukupi berkenaan dengan setiap pautan dalam rantaian jagaan, dari saat ekshibit telah diperoleh kembali oleh pihak polis sehingga sewaktu ia dikemukakan di mahkamah. Saksi menjelaskan bagaimana dan dari siapa ia diterima, di mana ia berada dan apa yang berlaku kepadanya semasa

dalam tahanan saksi, keadaan semasa ia diterima dan keadaan di mana ia diserahkan kepada hubungan seterusnya dalam rantaian jagaan (lihat perenggan 33–34 & 44).

(3) Saksi pendakwaan telah memberikan jawapan afirmatif bahawa Ahmad Tayyib hanya dilihat bersama-sama dengan perayu apabila perayu kembali untuk menyampaikan dadah kepada PW5. Saksi pendakwaan telah secara positif mengenal pasti perayu sebagai orang yang hadir di restoran dan menjalankan rundingan untuk jualan dadah tersebut. Perayu membawa beg berisi dadah ke tempat kejadian selepas dia berunding dengan PW4 dan dilihat memegangnya dan telah menyerahkan secara sendiri kepada PW5. Perayu pasti mempunyai pengetahuan bahawa beg itu mengandungi dadah kerana dia telah memberitahu terdapat lima papak dadah dalam beg tersebut. Dia memang bukan *conduit pipe* (lihat perenggan 48–49).

(4) Pemberi maklumat tidak bertukar menjadi ejen perangkap. Peranan pemberi maklumat pertama adalah terhad semata-mata kepada memperkenalkan PW4 kepada perayu. Walaupun dia hadir, tidak ada bukti langsung bahawa pemberi maklumat yang pertama telah mengambil bahagian dalam rundingan. Kehadirannya adalah semata-mata untuk memberi pinjaman kepercayaan kepada niat PW4 untuk membeli dadah di dalam fikiran perayu. Peranan pemberi maklumat kedua adalah lebih kecil kerana dia tidak melakukan apa-apa selain daripada hadir di restoran dengan PW5 (lihat perenggan 53).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

For cases on trafficking in dangerous drugs, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 301–302.

Cases referred to

Ghazalee bin Kassim & Ors v PP [2009] MLJU 402; [2009] 4 CLJ 737, FC (folld)

Johnson Tan Han Seng v PP [1977] 2 MLJ 66, FC (refd)

Munusamy v PP [1987] 1 MLJ 492; [1987] CLJ (Rep) 221, SC (folld)

Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (folld)

PP v Mohamed Ali [1962] 1 MLJ 257 (refd)

PP v Rajamah [1980] 2 MLJ 280, FC (refd)

Samivellu v PP [1972] 1 MLJ 28 (refd)

Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749; [2010] 1 CLJ 17, FC (folld)

Zaifull bin Muhamad v PP and another appeal [2013] 2 MLJ 348; [2013] 2 CLJ 383, FC (distd)

A *Zulkifli bin Md Rodzi v PP* [2013] 3 MLJ 745; [2013] 3 AMR 263, CA (distd)

Legislation referred to

Criminal Procedure Code ss 399, 399(i)(b), (2)(c), (2)(f)
Dangerous Drugs Act 1952 ss 2, 39B(1), (1)(a), (2), 40
B Evidence Act 1950 ss 56, 57(1)(a)

Appeal from: Criminal Trial No 45–20 of 2009 (High Court, Pulau Pinang)

Ranjit Singh Dhillon (J Kaur, Ranjit & Associates) for the appellant.
Ahmad bin Bache (Deputy Public Prosecutor, Attorney General's Chamber) for the
C *respondent.*

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

D

[1] This appeal is directed against the judgment of the High Court of Penang dated 10 February 2011. Vide the impugned judgment, the High Court convicted the appellant for an offence of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and sentenced him to death.

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THE CHARGE

[2] The charge reads as follows:

F Bahawa kamu pada 14 Mac 2008, jam lebih kurang 10.00 malam, di Restoran Nasi Kandar Pelita, Juru Autocity, Bukit Tengah, di dalam Daerah Seberang Tengah di dalam Negeri Pulau Pinang, telah memperedarkan dadah berbahaya jenis cannabis seberat 4420 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

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[3] This appeal raises questions of considerable importance concerning the admissibility of chemist report under s 399 of the Criminal Procedure Code ('CPC') in order to prove that the subject matter of the charge is a 'dangerous
H drug' as defined in s 2 of the DDA.

[4] It is necessary, before we embark upon the task of examining the merits or otherwise of the appeal, to state the facts of the case.

I FACTS OF THE CASE

The prosecution's version

[5] On 14 March 2008, at about 8.15pm, at Restoran Nasi Kandar Pelita,

Juru, Penang, Sarjan Mejar Busra bin Abdul Kadir ('PW4') was introduced to the appellant by his informer. PW4 then introduced himself as 'Along'. The appellant was nicknamed 'Abang'. A

[6] PW4 negotiated with the appellant for the purchase of proscribed drugs. The appellant offered 5kg of cannabis at the price of RM2,650 per kg. PW4 finally agreed to the price after some bargaining. B

[7] Before the appellant left the restaurant to get the drugs, PW4 asked the appellant to then deliver the drugs to Insp Saifulazre bin Ghazali ('PW5') and to collect the money from PW4, which the appellant agreed. C

[8] PW5 met up with the appellant outside the restaurant. He led the appellant to a Proton Waja bearing registration number WML 4578 which was parked nearby. He informed the appellant that he would take delivery in the car. The appellant agreed with that plan. D

[9] PW5 waited in the car. At about 10.00pm, PW4 saw a Proton Wira Aeroback approaching and stopped in front of his car. The appellant was the driver while another man (later identified as Ahmad Tayyib) was sitting at the front passenger seat. E

[10] Both the appellant and Ahmad Tayyib exited the car. Ahmad Tayyid went to sit at the driver's seat while the appellant opened the back passenger door of that car and retrieved a sling bag ('P17'). The appellant clutched the bag and walked towards PW5's car. He opened the front passenger seat of PW5's car and placed the bag on the floor mat of the passenger's side of the vehicle. PW5 asked the appellant: 'how many?' in which the appellant answered: '5'. F G

[11] PW5 unzipped the bag and found five slabs of compressed cannabis. PW5 then informed the appellant that the money is to be collected from 'Along' at the restaurant. The appellant then returned to the restaurant. H

[12] After having received confirmation from PW5 that the drugs were delivered, PW4 gave a pre-arranged signal, that is by scratching his head. Thereupon, ASP Mohd Salleh bin Abbas ('PW2'), rushed towards the appellant and arrested him. Ahmad Tayyib was also arrested by the police ambush party. I

[13] PW2 then led the appellant to PW5's car. PW5 showed PW2 the bag which was on the floor mat, passed it to PW2 and left the scene. PW2 opened the bag and found five slabs of compressed cannabis, wrapped in transparent

plastics. The appellant, Ahmad Tayyib, together with the seized items, were all brought to IPD Seberang Perai Tengah.

[14] The seized items were sent to Puan Rosni bt Hamid (deceased) for chemical analysis and via chemist report (P22), they were confirmed to be cannabis, a dangerous drug, having a net weight of 4,420g.

The defence's version

[15] The appellant gave evidence on oath. The appellant protested his innocence. The appellant admitted that he was with Ahmad Tayyib on the day in question. He accompanied Ahmad Tayyib to the restaurant as the latter wanted to meet his friends.

[16] The appellant said that while Ahmad Tayyib was chit-chatting with his friends, he was watching the television programme. He had no idea about the matters that were discussed between Ahmad Tayyib and his friends.

[17] The appellant went to the washroom and upon returning, he saw Ahmad Tayyib leaving the restaurant followed by one of his friends. They returned after 15–20 minutes. Then, a number of persons approached their table and arrested both him and Ahmad Tayyib.

[18] The appellant denied negotiating for the sale of any drug with PW4. He admitted having seen the sling bag while he was in the car but denied having any knowledge as to what was contained in the bag.

[19] At the end of the trial, the learned trial judge entertained no reasonable doubt that the evidence laid before her proved the appellant's guilt. After finding him guilty, as already pointed out, she sentenced the appellant to death as mandated under s 39B(2) of the DDA.

THE APPEAL

[20] The learned trial judge's decision is impugned on the following grounds:

(a) That the chemist report was wrongly admitted;

(b) There are serious doubts as to the identity of the drug exhibit;

(c) The learned trial judge had mishandled the facts with regards to Ahmad Tayyib; and

(d) The informers had become agent of provocateurs.

[21] Speaking through his learned counsel, Mr Ranjit Singh Dhillon, the appellant has strongly urged us to quash his conviction. Mr Ahmad bin Bache, learned deputy public prosecutor, opposed it. A

[22] We will proceed to deal with each of the grounds advanced by learned counsel in turn. B

Ground (a): admissibility of the chemist report

[23] The chemist report was prepared by one Rosni bt Hamid, prior to her untimely demise. After having satisfied that the requirements under s 399 of CPC have been complied with, and no objection was forthcoming from the defence, the learned trial judge admitted the said report and marked it as exh P22. C

[24] It was forcefully contended by learned counsel for the appellant, that from the evidence of PW7 (Director of the Penang Chemistry Department), the deceased is a 'Pegawai Sains' and not a government chemist under s 399(2)(c) of the CPC. Therefore, s 399 of the CPC does not apply and the report remains inadmissible although no objection was taken. The recent decision of this court, *Zulkifli bin Md Rodzi v Public Prosecutor* [2013] 3 MLJ 745; [2013] 3 AMR 263, was cited in support of this contention. As regards 'Pegawai Sains', the Court of Appeal had this to say at pp 752–753 (MLJ); p 28: D E

> [9] From the evidence of SP5 it is clear that he is not a government chemist though his function relates to the work of the chemist. *In essence if the report is not from the government chemist it is not admissible and has no relevance for purpose of* s 399 of the CPC*even though it was couched as a report under* s 399 of the CPC. Support for the proposition is found in a number of cases in India, even though there is no equipollent section such as s 399 of the CPC in India. Section 293 of the Indian Criminal Code which deals with similar issues, and the commentary to the said section by the learned author of *Ratanlal & Dhirajlal*, (13th Ed), 1987 to *The Code of Criminal Procedure* at p 304 reads as follows: F G
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> > This section makes provision for accepting in evidence reports made by certain Government Scientific Experts. It applies to the report of a 'Chemical Examiner or Assistant Chemical Examiner'. It does not extend to the report made by an Additional Chemical Examiner (*Atul Muchi*, (1984) 10 Cal 1026), or the Professor of Anatomy at the Government Medical College. (*Ahilya* (1922) 24 Bom LR 803, 47 Bom 74). H
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> [10] The learned deputy public prosecutor's argument that exh P13 can be admitted under s 45 EA 1950 cannot be sustained as it is trite that if a special procedure is prescribed under the Act then the general provisions found in the Act or other Acts cannot be followed. This principle is expressed by the *maxim genaralia specialibus non derogant*. (see *Public Prosecutor v Sandara Margaret Birch* [1997] 1 MLJ 129; *Baldeo and Others v Emperor* 1940 AIR Alahabad 263; article by *Hamid Sultan bin* I

Abu Backer — Md Desa v Public Prosecutor — A classic display of judicial vigilance [1997] 1 MLJ LXXXIII). The courts in India have gone to the extent of saying that if the report does not comply with the said section then for purpose of admissibility it is nothing more than a 'little scrap paper… it is not legal evidence' (see *Peary Lai v Emperor,* AIR 1938 Lah 496). In essence the court is not bound to accept and act on such report as conclusive evidence of its contents, (see *Bhaskaran v State,* 1967 KeLT 165).

[11] In the instant case the evidence of SP5 and also his report exh P13 has to be expunged. Once it has been expunged the prosecution case would have collapsed at the prosecution stage as the elements of the charge would not have been established and the accused had to be acquitted and discharged'.

(Emphasis added.)

[25] In spite of the high authority which was not favourable to the prosecution, learned deputy prosecutor was able to rise to the occasion. He referred us to s 399 of the CPC. This section reads as follows:

(1) Any document purporting to be a report under the hand of any of the persons mentioned in sub-s (2) upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the registrar of criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial or other proceeding under this Code unless that person or registrar shall be required to attend as a witness —

(a) by the court; or

(b) by the accused, in which case the accused shall give notice to the public prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the public prosecutor intends to give in evidence any such report he shall deliver a copy of it to the accused not less than ten clear days before the commencement of the trial. (2) The following are persons to whom the provisions of this section apply:

(a) officers of the Institute for Medical Research;

(b) Government Medical Officers;

(c) chemists in the employment of any Government in Malaysia or of the Government of Singapore;

(d) any person appointed by the Minister by notification in the *gazette,* to be a document examiner;

(e) Inspector of Weights and Measures appointed as such under any written law relating to weights and measures in force in Malaysia; and

(f) *any person or class of persons to whom the Minister by notification in the gazette declares that the provisions of this section shall apply.*

(3) The persons referred to in sub-s (2) and the registrar of criminals are by this Code bound to state the truth in reports made under their hands.

(Emphasis added.)

[26] The learned deputy public prosecutor submitted that from a bare reading of the above provision, the irresistible and inescapable conclusion is that the class of persons to whom the section may apply is not exhaustive as sub-s (2)(f) confers powers upon the Minister to *gazette* other person or other class of persons. Learned deputy public prosecutor produced for our consideration the relevant *gazette*, namely, PU (B) 324 of 2004.

[27] For ease of reference, *Gazette* Notification PU (B) 324 of 2004 is reproduced and it reads as follows:

CRIMINAL PROCEDURE CODE

NOTIFICATION OF DECLARATION UNDER SUBSECTION 399(2)

In exercise of the powers conferred by paragraph 399(2)(f) of the Criminal Procedure Code, the Minister declares that the Science Officers employed in the chemistry Department, Malaysia and who prepare reports on any person, matter or thing referred to the department for examination or analysis, is a class of persons to whom the provisions of section 399 of the Criminal Procedure Code shall apply.

(2) The declaration under paragraph (1) shall apply to the Science Officers for the period that they remain employed in the Chemistry Department, Malaysia.

Dated 3 August 2004

[KSTAS, 260 010/A002B Jil 3; PN (PU) 224/111]

DATO' MOHD RADZI SHEIKH AHMAD

Minister in the Prime Minister's Department

[28] In our view, this notification of declaration which in effect is the effective recognition that science officers employed by the chemistry department is a class of persons to whom the provisions of s 399 of the CPC shall apply and whose report may be given in evidence, without the makers being required to attend as witnesses, provided that the precondition of service of a copy of the report as laid down in the section had been strictly complied with.

[29] It is trite that under s 57(1)(a) of the Evidence Act 1950 the court must take judicial notice of all laws or regulation having the force of law now or heretofore in force or hereafter to be in force in Malaysia or any part thereof. Judicial notice must therefore be taken of Legal Notification (see *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257 (HC) and *Gazette* Notification (see *Public Prosecutor v Rajamah* [1980] 2 MLJ 280 (FC)). In *Samivellu v Public Prosecutor* [1972] 1 MLJ 28 (HC), it was held that a court is only bound to take

judicial notice of any regulation when the relevant *gazette* notification is either quoted in the charge or adduced in evidence. This view, however, did not find favour with the Federal Court in *Johnson Tan Han Seng v Public Prosecutor* [1977] 2 MLJ 66 (FC), where Raja Azlan Shah FJ (as His Highness then was) said at p 78:

> I agree with the learned Lord President that *Samivellu v Public Prosecutor* [1972] 1 MLJ 28 was wrongly decided. Proclamation PU(A) 148/69 is the law which the court can take judicial notice.

[30] Section 56 of the Evidence Act 1950 provides that no fact of which a court can take judicial notice need be proved. It is one of the exceptions to the general rule that all facts in issue and relevant facts must be proved by evidence.

[31] It is not in dispute that P22 was served upon the appellant on 8 February 2010. No notice was given by the appellant or his counsel to the public prosecutor under s 399(i)(b) of the CPC prior to the commencement of trial on 20 September 2010. Therefore, it is our considered view that the learned trial judge had not erred in admitting the said report.

[32] We have examined the case of *Zulkifli bin Mohd Rodzi v Public Prosecutor* with great care and have found that the court's attention was apparently not drawn to the *Gazette* Notification PU (B) 224 of 2004. The decision of the court in that case could have been different if the parties had drawn the court's attention to it.

Ground (b): Identity of the drug exhibit

[33] Learned counsel for the appellant submitted that in the present case that there were serious doubts as to the identity of the drug exhibit based on the following grounds:

(a) Inconsistent descriptions of the markings of the exhibits; and

(b) Discrepancies in the weight mentioned in the exh P22 (4,420g) compared to the original charge (5,000g).

[34] With respect, based on the evidence, the submission is devoid of any merit. The material evidence on these issues are that of SP2, SP6 and exh P22. SP2 testified that from the time he took possession of the exhibits at the place of incident until he handed them over to the investigating officer (SP6), the drugs exhibits were under his personal custody and control. When he arrived at his office, he marked the bag as 'S' and the five slabs of drug exhibits wrapped in transparent plastics as 'S1-S5'. He also weighed the drug exhibits and the gross weight was 5kg. He then handed over the exhibits to SP6.

[35] SP6, in his testimony, confirmed that he received exhibits bearing those markings from SP2 at about 11.50pm. He later marked the bag as 'R' and the five slabs of drug exhibits as 'R1-R5'. He then kept the exhibits in the steel cabinet under lock and key.

[36] On 15 March 2008, at about 3.00pm, SP 6 took the exhibits from the steel cabinet for the purpose of having them photographed at his office. The exhibits were then packed in a box. SP6 placed a wax seal bearing with words 'PDRM 595', his name, the report number on the box. The box was kept in the steel cabinet under lock and key.

[37] On 17 March 2008, SP6 sent the box containing the marked exhibits to the deceased, together with a cover letter, requesting chemical analysis, POL 31 (P19). While preparing P19, SP6 had listed the description of the bag and the drug exhibits and the markings that he made. He confirmed that the deceased opened the box and inspected the exhibits in his presence before issuing the receipt (P20). He received the exhibits from the deceased on 16 December 2008 at about 4.30pm together with the report (P22).

[38] The deceased, via P22, gave the description of the exhibits, as follows:

(i) 1 bungkusan bertanda 'R' termeterai 'POLIS DI-RAJA MALAYSIA 595;

(ii) 1 beg bertanda 'R'and

(iii) 5 bungkusan plastik bertanda 'R-V hingga 'R-5'.

[39] Learned counsel contended that the exhibits received by the deceased bore different markings from the exhibits that were actually sent to the Chemistry Department.

[40] With respect, the first ground advanced by learned counsel is misconceived. During the course of the trial, both SP2 and SP6 had explained the condition of the exhibits and the respective markings. They had also made positive identification of the exhibits based upon the photographs (P5(R), P5(T)).

[41] Concerning the second ground, learned counsel submitted that no explanations were given for the discrepancies in weight of the drug exhibits. The recent case of *Zaifull bin Muhamad v Public Prosecutor and another appeal* [2013] 2 MLJ 348; [2013] 2 CLJ 383 was cited in support, where it was held by the Federal Court at p 358 (MLJ); p 393 (CLJ) that:

> [35] With respect, we could not agree with the prosecution on this issue. We are of the view that, in the circumstances of this case, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left

unexplained, this created a reasonable doubt as to the identity of the drug exhibits. In the circumstances, the defence should not have been called at the close of the prosecution's case.

[42] The facts in *Zaifull bin Muhamad v Public Prosecutor* are far cry from the present case. In this case, there were material discrepancies in the gross weight of the cannabis mentioned in the original charge compared to the evidence of PW2 and material discrepancy in the number of 'ketulan' mentioned in the original charge and number of "ketulan" as testified by PW2, PW4, and PW8. The Federal Court held that there were discrepancies that go to the issue of identity of the drug exhibit. In such circumstances, it was incumbent upon the prosecution to offer some explanation for the discrepancies. This was not done. With the discrepancies left unexplained, it created a reasonable doubt as to the identity of the drug exhibit.

[43] We are mindful that what is a stake here is no less than the mandatory death penalty case. The dangerous drug itself, the cannabis in the present case, constitutes the very corpus delicti of the offence and in sustaining conviction for drug trafficking offence under the DDA, the identity and integrity of the corpus delicti must be established beyond reasonable doubt. In other words, it must be proven with exactitude that the substance seized or recovered during the operation is the some substance produced in evidence before the court.

[44] In the present case, we entertained no doubt that the exhibit recovered or seized by the police was the same exhibit sent to and examined by the deceased and subsequently produced in court as evidence. We are satisfied that the prosecution had adduced sufficient evidence in respect of every link in the chain of custody, from the moment the exhibit was recovered by the police up to the time it was produced in court. The witnesses had described how and from whom it was received, where it was and what happened to it while in the witnesses' custody, the condition in which it was received and the condition in which it was handed over to the next link in the chain of custody.

Ground (c): The involvement of Ahmad Tayyib

[45] The relevant portion of the learned trial judge's judgment reads as follows:

> … Ahmad Tayyib tidak terlibat langsung dalam perundingan jual beli dadah di antara OKT dan SP4 di Restoran Nasi Kandar Pelita. Berdasarkan keterangan SP4 dan SP5, Ahmad Tayyib hanya muncul bersama OKT semasa OKT datang untuk menyerahkan dadah kepada SP5. Pada ketika itu juga peranan Ahmad Tayyib hanyalah sebagai penumpang di dalam kereta Proton Wira Aeroback nombor pendaftaran PFJ5567. Ahmad Tayyib tidak dilihat memegang beg warna hitam kuning berisi dadah atau menyerah beg tersebut kepada SP5. Apabila OKT pergi

semula ke Restoran Nasi Kandar Pelita, Ahmad Tayyib telah masuk ke tempat duduk pemandu dalam kereta Proton Wira Aeroback itu. Hanya setakat itu sahaja penglibatan Ahmad Tayyib di dalam kes ini.

[46] Learned counsel contended that the learned trial judge took an over simplistic approached when Her Ladyship addressed the possibility of Ahmad Tayyib being involved in this case.

[47] Having scrutinised the evidence and the grounds of judgment, we are satisfied that the learned trial judge was right in arriving at that conclusion.

[48] PW2, PW4 and PW5 were cross-examined at length on the basis that Ahmad Tayyib was the actual trafficker who negotiated the sale of the cannabis and delivered the drugs. They had denied the suggestions put forth by the defence counsel, and had given affirmative answers that Ahmad Tayyib was only seen together with the appellant when the appellant returned to deliver the drugs to PW5.

[49] The prosecution witnesses had positively identified the appellant to be the man who was present in the restaurant and conducted the negotiation for sale of the drugs. The bag of drugs was brought to the scene by the appellant after he negotiated with PW4. The appellant was seen clutching the bag and delivered it personally to PW5. He certainly had knowledge that the bag contained drugs as he informed PW5 that there were five slabs of drugs in the bag. He was certainly not a conduit pipe as submitted by the learned counsel.

[50] The learned trial judge had properly directed her judicial mind and viewed the whole of the evidence objectively and from all angles. In the circumstances of the case, we are convinced that the presence of Ahmad Tayyib could not cast a reasonable doubt in the prosecution's case.

Ground (d): The informers

[51] Informer 1 had introduced PW4 to the appellant and was present at the restaurant throughout the negotiations between PW4 and the appellant. informer 2 who accompanied PW5 was also present at restaurant, but left before PW5 led the appellant to his car. Learned counsel submitted that both informers had assumed the mantle of agent provocateurs and thus the protection under s 40 of the DDA had ceased to operate.

[52] This issue has been discussed in cases like *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] 1 CLJ 250; [1987] CLJ (Rep) 221, *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 333 (FC),

Ghazalee bin Kassim & Ors v Public Prosecutor [2009] MLJU 402; [2009] 4 CLJ 737 (FC), *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749; [2010] 1 CLJ 17 (FC). From these cases, it is clear that whether a person is an informer or has become an active agent provocateur would depend on the facts and circumstances of each particular case.

[53] In the present case, informer 1's role was limited to mere introduction of PW4 to the appellant. Though he was present, there is no iota of evidence that informer 1 had participated in the negotiation. His presence was merely to lend credence to PW4's intention to purchase the drugs in the minds of the appellant. Informer 2's role was even smaller. He had done nothing apart from being present at the restaurant with PW5. We are of the view that they had not metamorphosed into agent provocateurs.

CONCLUSION

[54] We had meticulously and thoroughly examined the appeal record and had paid due attention to learned counsel's arguments. In our considered view, there was overwhelming evidence to establish that the appellant was caught flagrante delicto selling the dangerous drug to PW4.

[55] In spite of soldierly courage which learned counsel demonstrated while arguing the case for the appellant, he has not succeeded in persuading us that the learned trial judge had committed appealable errors, warranting appellate intervention.

[56] For the reasons we have given, we have reached the unhesitating conclusion that the appeal was devoid of any merit. In the result, the appeal is dismissed and the conviction and sentenced imposed by the learned trial judge is hereby affirmed.

Appeal dismissed.

Reported by Afiq Mohamad Noor